

401 Frequently Asked Questions (FAQs)

What is 401 Water Quality Standards Certification and how do I know if I need it?

Section 401(a)(1) of the Clean Water Act (CWA) specifies that any **applicant** for a **Federal license or permit** to conduct any activity, including but not limited to the construction or operation of facilities that may result in any discharge into navigable waters, shall provide the federal licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable water at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Clean Water Act. Succinctly, this means that in California, the Regional Board must certify that the project will comply with water quality standards (defined below).

Permits or Licenses requiring 401 Certification:

1. Permits issued by the U.S. Army Corps of Engineers (ACOE) under Section 404 of the Clean Water Act (in California, this is the most common type of permit for which certification is necessary)
2. National Pollutant Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) under Section 402 of the Clean Water Act
3. Permits issued under Sections 9 and 10 of the Rivers and Harbors Act (for activities that may affect navigation)
4. Licenses for hydroelectric power plants issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act
5. Licenses issued by the Nuclear Regulatory Commission

Water quality standards include:

Beneficial Uses - defined as the uses of water necessary for the survival or well being of man, plants, and wildlife. Beneficial uses are designated in the Basin Plan for water bodies within the Region. Examples include municipal and domestic supply, water contact recreation, wildlife habitat, and warm water aquatic habitat.

Water Quality Objectives - numeric and/or narrative limits or bans on substances, water characteristics, and activities.

Antidegradation Policy - requires that existing high-quality waters be protected and maintained, unless the need to lower water quality is justified.

The Clean Water Act defines navigable waters as “waters of the United States.” Waters of the United States are defined in 33 CFR (Code of Federal Regulations) Section 328.3 (a) as:

- (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- (2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which could affect interstate or foreign commerce . . .”

(4) All impoundments of waters otherwise defined as waters of the United States under the definition [except subsection (a)(3) waters];

(5) Tributaries to waters identified in paragraphs (a)(1)[, (2), and] (4) of this section;

(6) The territorial seas; and

(7) Wetlands adjacent to waters (other than waters which are themselves wetlands) identified in paragraphs (a)(1)[, (2), (4), (5), and] (6) of this section

Note: Clean Water Act Section 404/401 requirements may not apply to isolated, nonnavigable waters, pursuant to a recent (January 9, 2001) U.S. Supreme Court decision *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 US __, 121 S.Ct. 675 (2001), hereinafter “SWANCC”). Please contact the USACOE to determine whether the SWANCC decision affects your proposed project. ([USACOE press release](#)) **It is important to note that even if Section 404/401 requirements do not apply, Regional Board requirements under state law for waste discharges to waters of the state must be satisfied.** ([SWANCC memo](#))

If you are not sure if you have a waters of the U.S. or waters of the state on your property, consult an expert; do not assume that you do not, as you may be subject to civil and criminal penalties if such waters are dredged or filled without authorization.

How can I get a 401 application?

Applications can be downloaded from the web, faxed to you, or picked up at the Regional Board's office. Applications can be downloaded in [Adobe Acrobat](#) and [Word](#) from www.swrcb.ca.gov/rwqcb8/html/401.html. To request an application by fax, please contact Kelly Schmoker, the 401 Coordinator, at (909) 782-4990. Applications may be picked up at the Regional Board's office located at 3737 Main Street, Suite 500, Riverside, CA 92501-3348.

Are the 401 applications for all Regional Boards the same?

Each Regional Board has a different 401 application. You are responsible for submitting the correct application to the correct region. If you are unsure of which application to use, or if your project is on the border of two regions, please contact the Regional Board prior to submittal.

Do I need to submit a cover letter and fill out the form?

A cover letter including all the information detailed in the 401 Water Quality Standards Certification Application form can be submitted, or else the 401 Water Quality Standards Certification Application form can be filled in and submitted.

What are the timelines for processing a 401 application?

Once an application has been deemed complete, the Regional Board has between 60 days and 1 year in which to make a decision. According to regulations of the United States Army Corps of Engineers (Corps), the State has 60 days from the date of receipt of a valid request for water quality standards certification (33 CFR Section 325.2 (b) (1) (ii)). The district engineer may specify a longer (up to one year) or shorter time, if he or she determines that a longer or shorter time is reasonable (33 CFR Section 325.2 (b) (1) (ii)). If processing and review of the 401 application will take more than 60 days, the Regional Board will request additional time from the Corps. This request usually occurs when an applicant has not supplied requested information or the project is complex and issues have not been resolved. Please note that even when an application has been deemed complete, the Regional Board can request additional documentation, if necessary, to clarify impacts, mitigation, or other aspects of the application. If the Corps does not grant a time extension, the Regional Board has the option of denial without prejudice. This is not a reflection on the project, but a means to stop the clock until the required information has been provided.

As required by 23 California Code of Regulations (CCR) § 3858(a), the Regional Board is required to have a minimum 21 day public comment period before any action is taken on a 401 application. The period closes when the Regional Board acts on the 401 application. The public comment period does not close after a certain number of days because proposed projects tend to change through the 401 process and the public is allowed to review and comment on the changed project. The public comment period starts as soon as an application has been received.

Where can I get a copy of the 401 regulations?

Copies of the current regulations are available online at
<http://www.swrcb.ca.gov/rwqcb8/401/401regs.pdf>

Who should I contact with questions regarding 401 Water Quality Standards Certification?

For questions regarding the 401 process, please contact Kelly Schmoker, the 401 Coordinator, at (909) 782-4990. For questions regarding a specific project, please contact the person handling that project, if known.

When should I submit my 401 application?

Applications are typically submitted concurrently with submittals to the Corps and California Department of Fish and Game (CDFG). The Regional Board encourages you to submit a complete application as soon as possible. Due to the varying degree of complexity among 401 applications, the time necessary to review and process an application can vary greatly. It is to the applicant's advantage to submit a 401 application concurrently with 404 applications and to hold joint meetings with all resource agencies, which will help facilitate communication and coordination between the applicant and the agencies. Also, a 401 certification is required before a 404 permit or authorization can be issued; therefore, it is in the applicant's best interest to submit a complete application as soon as possible.

May I consult with Regional Board staff prior to submitting my application?

Regional Board staff encourages applicants to discuss their project prior to final design. Please contact the 401 Coordinator, Kelly Schmoker, at (909) 782-4990 to schedule an appointment.

Staff also attend pre-application meetings sponsored by the California Department of Fish and Game and Army Corps of Engineers; please contact the local offices for their meeting schedules.

Where do I send my application?

The application should be addressed to the Executive Officer of the Santa Ana Regional Water Quality Control Board. For quicker routing, send it to the **attention of the 401 coordinator**. A sample address block follows:

Your application should be sent to:
Mr. Gerard J. Thibeault
Executive Officer
California Regional Water Quality Control Board
Santa Ana Region
3737 Main Street, Suite 500
Riverside, CA 92501-3348
Attn: 401 Coordinator

What is the public notification period and is it the same as the Army Corps of Engineers public notice period?

The California Code of Regulations, Section 3858(a) states “The executive director or the executive officer with whom an application for certification is filed shall provide public notice of an application at least twenty-one (21) days before taking certification action on the application, unless the public notice requirement has been adequately satisfied by the applicant or federal agency. If the applicant or federal agency provides public notice, it shall be in a manner and to an extent fully equivalent to that normally provided by the certifying agency. If an emergency requires that certification be issued in less than 21 days, public notice shall be provided as much in advance of issuance as possible, but no later than simultaneously with issuance of certification.”

Public notice of pending 401 Water Quality Standards Certification applications within the Santa Ana region is provided on the Regional Board’s web site at <http://www.swrcb.ca.gov/rwqcb8/html/401pn.html>, or by calling Kelly Schmoker at 909-782-4990.

The Regional Board's public notice period is separate and distinct from the Corps' public notice period. Public comments will be accepted on a pending 401 application until an action is taken. An action will not occur within the 21-day comment period unless the project is an emergency.

What are the fees for processing a 401 application?

Per 23 CCR § 2200(e) and 23 CCR § 3833(b)(2), the fees for 401 Water Quality Standards Certification are:

1. The total fee, including deposit, for issuing standard certification (no potential for water quality standards impacts--please consult with the Regional Board before making this determination) as defined in Subsection 3831(p) shall be \$500 or, if \$500 does not cover the agency's cost to issue certification, the appropriate one-time amount determined from items 3 or 4 below.

2. The total fee, including deposit, for taking any other certification action for a discharge of fill/excavated or dredge material shall be the appropriate one-time amount determined from items 3 or 4 below.
3. The total fee, including deposit, for issuing a certification action for **fill**:
 - One acre or less, total fee of \$1,000
 - More than one acre, \$1,000 per acre or part thereof, to a up to a maximum of \$10,000
4. The total fee, including deposit, for issuing a certification action for **dredging**:
 - Less than 10,000 cubic yards - flat fee of \$500
 - 10,000 to 20,000 cubic yards –flat fee of \$2,000
 - More that 20,000 cubic yards - \$2,000 plus \$250 for each additional 5,000 cubic yards or part thereof, up to the statutory maximum of \$10,000.

Dredging generally includes removing sediment in deeper water to increase the depth. Impacts to beneficial uses are best described by the volume of sediment discharged. Dredging typically occurs to facilitate navigation and for aggregate extraction in marine waters.

All fees should be made payable to the Santa Ana Regional Water Quality Control Board and submitted to 3737 Main Street, Suite 500, Riverside, CA 92501-3348, **Attn: 401 Certification**

What are the requirements for an application to be determined complete?

The “[Contents of a Complete Section 401 Application](#)” outlines everything that we anticipate will be necessary for a complete application. Note that in some cases, the Regional Board may request additional information even when an application has been deemed complete.

What other approvals might be necessary for impacting a waters of the U.S.?

The Army Corps of Engineers (ACOE). <http://www.spl.usace.army.mil/co/co5.html> or call (213) 452-3425.

The regulatory authority of the Corps of Engineers for projects in waters of the U.S. is based on Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Section 404 of the Clean Water Act requires Corps authorization for work involving placement of fill or discharge of dredged materials into any "waters of the United States". Section 10 of the Rivers and Harbors Act requires Corps authorization for work or structures in or affecting "navigable waters". Corps jurisdiction extends up to the ordinary high water line for non-tidal waters and up to the line of high tide (for dredge or fill), or mean high water line (for work or structures) for tidal waters.

TYPES OF PERMITS (from ACOE website at <http://www.spk.usace.army.mil/cespk-co/regulatory/RPP-bro.html>)

Individual Permits

Individual permits are issued following a full public interest review of an individual application for a Department of the Army permit. A public notice is distributed to all known interested persons. After evaluating all comments and information received, final decision on the application is made.

The permit decision is generally based on the outcome of a public interest balancing process where the benefits of the project are balanced against the detriments. A permit will be granted unless the proposal is found to be contrary to the public interest.

Processing time usually takes 60 to 120 days unless a public hearing is required or an environmental statement must be prepared.

To apply for an individual permit, an application form must be completed. This application is available from all Corps regulatory offices.

Nationwide Permits

A nationwide permit is a form of general permit which authorizes a category of activities throughout the nation. These permits are valid only if the conditions applicable to the permits are met. If the conditions cannot be met, a regional or individual permit will be required. Summaries of the nationwide permits are available.

Regional Permits

Regional permits are issued by the District Engineer for a general category of activities when

1. the activities are similar in nature and cause minimal environmental impact (both individually and cumulatively), and
2. the regional permit reduces duplication of regulatory control by State and Federal agencies.

The California Coastal Commission <http://www.coastal.ca.gov/web/> or call the South Coast office at (562) 590-5071.

The California Coastal Act of 1976 requires any person proposing to undertake development in the Coastal Zone to obtain a Coastal Development Permit. The Coastal Zone extends inland anywhere from approximately 500 yards in developed urban areas to five miles in undeveloped areas. If projects are proposed in or adjacent to existing or historic coastal wetland areas, they will require Coastal Development Permits issued by the Coastal Commission. To find out if your project is in the Coastal Zone you should contact the Coastal Commission or the planning division of your local government.

California Department of Fish and Game (CDFG).

<http://www.dfg.ca.gov/1600/1600.html> or call the Region 6 office (Riverside, San Bernardino counties) at (562) 590-5880 or the Region 5 office (Orange county) at (858) 467-4201.

The California Department of Fish and Game requires a Streambed Alteration Agreement (SAA) for projects that will divert or obstruct the natural flow of water, change the bed, channel, or bank of any stream, or propose to use any material from a streambed. The SAA is subject to the California Environmental Quality Act (CEQA) and all information necessary for stream projects must be disclosed.

U.S. Fish and Wildlife Service. Please visit the Carlsbad Fish and Wildlife Service Office's website at <http://carlsbad.fws.gov/> or call (760) 431-9440 for more information.

The U. S. Fish and Wildlife Service reviews and comments on projects pursuant to the Fish and Wildlife Coordination Act, the Clean Water Act, and the National Environmental Policy Act. The Service's comments focus on the effects of projects on all fish and wildlife resources and the habitats that support those resources. Such projects may be, but are not limited to, flood control, urban and industrial development, habitat restoration activities, etc. The Service also reviews

projects for their effects pursuant to the Federal Endangered Species Act (ESA, or Act). The Act, through Section 9, prohibits the take of any species listed as threatened or endangered pursuant to the Act without a specific exemption. The term "take" is broadly defined and if "take" is going to occur, a permit from the Service is required. If there is another Federal Agency involved then exemption from the "take" provisions of the Act can be achieved through a Section 7 process. If there is no Federal involvement, then the applicant develops a Habitat Conservation Plan (HCP) in order to apply for an incidental take permit under Section 10(a)(1)(B) of the ESA.

National Marine Fisheries Service. <http://www.nmfs.noaa.gov> or phone the Southwest Region at (562) 980-4000.

The National Marine Fisheries Service (NMFS) is the federal agency responsible for the conservation and management of the nation's living marine resources. Projects or activities that may affect marine fish and related habitat within NMFS jurisdiction are reviewed for any potentially harmful effects. These evaluations are conducted under the authorities of the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act, and the National Environmental Policy Act. The purpose of reviews conducted by NMFS is to ensure that sensitive populations of marine and anadromous fish (such as salmon and steelhead), as well as the aquatic and riparian habitat that support these fish, can survive and recover in the presence of human activities. Through these reviews, the need to conserve and protect fish and habitat is balanced with the need to responsibly utilize natural resources for economic and other purposes. The types of projects and activities of interest to NMFS include streambank stabilization, streambed alteration, habitat restoration, flood control, urban and industrial development, and water resource utilization. When projects or activities require a federal permit, such as a Clean Water Act Section 404 permit from the Army Corps of Engineers, then NMFS conducts a consultation with the federal agency under Section 7 of the ESA. When there is no federal involvement, then for projects that incidentally "take" a listed species, a permit under Section 10 of the ESA is required.

City and County Government Review. There may also be regulatory requirements associated with city and county ordinances. The applicant is responsible for knowing all the applicable rules and regulations, and for compliance with them. For more information, call your local Planning Department and provide them with the address of the property and Assessor Parcel Number (APN).

California Environmental Quality Act (CEQA) Review. The main purpose of CEQA review is to identify and prevent significant adverse environmental impacts from proposed projects. The agency with first discretionary approval authority serves as the lead agency for CEQA purposes.

What is the Basin Plan and how can I get a copy?

Each of the nine Regional Boards within California is required to adopt a Water Quality Control Plan, or Basin Plan. Each Basin Plan is designed to preserve and enhance water quality and protect the beneficial uses of all regional waters. Specifically, the Basin Plan: (1) designates beneficial uses for surface and ground waters; (2) sets narrative and numerical objectives that must be attained or maintained to protect the designated beneficial uses and conform to the state's antidegradation policy; (3) describes implementation programs to meet the objectives and protect the beneficial uses of all waters in the region; and (4) describes surveillance and monitoring activities to evaluate the effectiveness of the Basin Plan.

Copies of the Basin Plan may be obtained by contacting the Regional Board at 909-782-4130, or may be obtained online at:

<http://www.swrcb.ca.gov/rwqcb8/> and click on the “Basin Plan” button or go directly to http://www.swrcb.ca.gov/rwqcb8/html/basin_plan.html

What is the relationship between 401 and storm water construction regulations and requirements?

There is no regulatory connection between 401 Water Quality Standards Certification and construction storm water permits; in other words, one is not a requirement of the other. Some of the information developed for a Storm Water Pollution Prevention Plan (SWPPP) will be necessary for the 401 certification. For example, Best Management Practices (BMPs) to control urban runoff during construction and over the life of the project will need to be addressed during the 401 certification process as well as in the SWPPP. Submittal of a SWPPP to supply information for a 401 application does not satisfy construction storm water requirements.

What are the requirements of the Regional Board's Order No. 01-34 “Watershed-wide Waste Discharge Requirements for Storm Water Discharge Associated with New Developments in the San Jacinto Watershed”?

This Order regulates pollutants in discharges of storm water associated with new developments to surface waters from areas tributary to Lake Elsinore and Canyon Lake (San Jacinto Watershed). The Order prohibits the discharge of materials other than storm water and authorized non-storm water. Order No. 01-34 is similar to the State Water Resources Control Board’s General Storm Water Construction Activity (Water Quality Order No. 99-08-DWQ) (State Board’s General Construction Permit) except for the following:

- a) Monitoring and reporting requirements have been added;
- b) Storm Water Pollution Prevention Plans (SWPPPs), Monitoring Programs, and Post-construction Management Plans must be submitted for approval by the Regional Board's Executive Officer in advance of construction activities; and,
- c) Offset provisions have been added.

Projects that have obtained coverage under the State Water Resources Control Board’s General Construction Permit (Water Quality Order No. 99-08-DWQ) prior to January 19, 2001 are not considered new developments and are not required to get coverage under Order No. 01-34.

For more detailed information on Order No. 01-34 and its requirements, please see our web page at <http://www.swrcb.ca.gov/rwqcb8/> and click on the “Adopted Orders” button or go directly to the “Adopted Orders” web page at http://www.swrcb.ca.gov/rwqcb8/html/adopted_orders.html. To view a map of the San Jacinto Watershed, please visit http://www.swrcb.ca.gov/rwqcb8/html/san_jacinto_watershed.html.

What are the possible 401 decisions?

After review of the application, all relevant data, and any recommendations of a Regional Board, other state and federal agencies, and any interested person, the State Board's Executive Director, when acting as the State Board's designee, or the Regional Board Executive Officer issues certification or denies certification for any discharge resulting from a pertinent activity before the federal period for certification expires. Conditions must be added to any certification, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements. If certification is denied, the applicant is notified in writing of the denial and the reasons for the denial.

An application for water quality standards certification may be denied when:
the activity requiring a federal license or permit will result in a discharge that will not comply with applicable water quality standards and other appropriate requirements; or compliance with water quality standards and other appropriate requirements is not yet definitively determined, but the application suffers from some procedural inadequacy (e.g., failure to provide a complete fee or to meet CEQA requirements). In this case denial shall be without prejudice.

The Corps said I don't need a permit, but do I need 401 certification?

If your project is located within or adjacent to a waterway, or can potentially impact a waterway, the Regional Board and the Department of Fish and Game probably regulate it. The Corps classifies some projects as minimal impact under the Nationwide Permit Program (NWP). If your project fits into one of 40 NWP categories, the project may come under the Corps general permit conditions. Some NWPs do not even require advance notification to the Corps.

Section 401 of the Clean Water Act grants each state the right to ensure that the State's interests are protected on any federally permitted activity occurring in waters of the State. In California, the Regional Water Quality Control Boards are the agency mandated to ensure protection of the State's waters. If a project comes under the Corps' jurisdiction, California also regulates it to ensure and certify compliance with state regulations.

California has not found that most of the 40 activities under the Nationwide Program are of minimal impact and therefore has not provided advance approval of most of the Nationwide Permits. Although the activity may be covered under a general permit from the Corps, **you will still need to obtain a 401 certification from the State of California.**

What is "SWANCC"?

A Supreme Court ruling *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (531 US __, 121 S.Ct. 675 (2001)) concerning Clean Water Act jurisdiction over isolated, non-navigable, intrastate waters used as habitat by migratory birds. The decision changes slightly the way the Army Corps of Engineers administers the Clean Water Act Section 404 program dealing with work in wetlands and other waters. ([USACOE press release](#)) Nothing in the SWANCC decision alters the extent of State (or tribal) jurisdiction over aquatic features under State (or tribal) law.

For more information, please go to
<http://www.spl.usace.army.mil/co/regulatory/supremeC2Ruling.pdf>
[SWANCC Memo](#)

IT IS IMPORTANT TO NOTE THAT EVEN IF SECTION 404/401 REQUIREMENTS DO NOT APPLY, REGIONAL BOARD REQUIREMENTS UNDER STATE LAW FOR WASTE DISCHARGES TO WATERS OF THE STATE MUST BE SATISFIED.